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No. 97-1304

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ADARAND CONSTRUCTORS, INC.,

Plaintiff-Appellee

v.

RODNEY E. SLATER, Secretary of Transportation, et al.,

Defendants-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Honorable Judge John L. Kane, Jr.

THE FEDERAL APPELLANTS' SUPPLEMENTAL BRIEF

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THE FEDERAL APPELLANTS' SUPPLEMENTAL BRIEF

The Supreme Court reversed this Court's judgment that the case was moot, holding that the federal appellants, not Adarand, must carry the burden of proof. Adarand v. Slater, 120 S. Ct. 722, 725 (2000). This Court raised several questions relating to mootness and the impact of intervening changes to the programs at issue here. Since the district court issued its 1997 order now on appeal, the Department of Transportation (DOT) has eliminated use of the Subcontracting Compensation Clause (SCC) program in future contracts (see addendum). The elimination of the SCC does not entirely, however, moot this appeal, because the district court also held the federal aid Disadvantaged Business Enterprise (DBE) program unconstitutional.[1/]

1/ The case could also be moot if Adarand seeks DBE certification and is certified by a Colorado Department of Transportation program that has received DOT approval and that properly applies DOT's standard for qualifying a non-minority owned business as a DBE. DOT has not yet approved Colorado's program.

Congress reauthorized the DBE program in the Transportation Equity Act for the 21st Century (TEA-21). New regulations have been issued implementing the reauthorized program, which more narrowly tailor the program. The federal appellants intend to continue the new, more narrowly tailored, DBE program.

The impact of these changes upon issues such as mootness and standing, and the interplay of those issues as discussed by the Supreme Court in Adarand v. Slater, 120 S. Ct. 722 (2000), and Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc., 120 S. Ct. 693 (2000), are best addressed in the first instance by the district court. These issues involve factual disputes the district court is best equipped to resolve. Therefore, this Court should remand the case so the district court may consider the elimination of the SCC and the significant changes to the DBE program that have occurred since the district court issued its 1997 order now on appeal.

THE CASE SHOULD BE REMANDED TO THE DISTRICT COURT

A. The District Court Should First Address The Changes To The DBE Program

Since the district court's decision, DOT significantly altered the DBE program to address that court's determination that the program was not sufficiently narrowly tailored and has more recently rescinded the SCC for all new contracts. Since the suit involves only prospective relief, only the current regulatory programs are at issue. The federal appellants should be permitted to supplement the record before the district court. As we have shown in our earlier submissions (Br. 35-47), the district court improperly

adjudicated the constitutionality of the DBE program. In any event, that DBE program has been superseded by a new, more narrowly tailored, program. See pp. 4-15, infra. Indeed, the new DBE program is before the district court in Adarand v. Owens, No. 97-K-1351, in which DOT is a defendant. Since the newly amended DBE program will be reviewed by the district court, it is in the interest of judicial economy to remand this case to that court for further proceedings and possible consolidation with Owens.

1. A case should be remanded to the lower court when there are changes in statutes and regulations, enacted after the judgment being reviewed, that bear upon the lawfulness of the challenged action. In Lawrence v. Chater, 516 U.S. 163, 165-166 (1996) (per curiam), the Court remanded the judgment in light of a new interpretation of the Social Security Act that the Social Security Administration had adopted with respect to the establishment of paternity under state law. The Court unanimously agreed that when the lower court had no opportunity to review an intervening change in law, the case should be remanded for that purpose. Id. at 167. That is the case here. Since the June 2, 1997, entry of the judgment now on appeal, a new statute has been enacted and new regulations relevant to the constitutionality of the DOT programs at issue have been promulgated. On June 9, 1998, the President signed the Transportation Equity Act for the 21st Century (TEA-21), Pub. L. No. 105-178, 112 Stat. 107, as the successor statute to the Intermodal Surface Transportation Efficiency Act (ISTEA). In TEA-21, Congress, after extensive debate, reenacted the requirement

that, except to the extent the Secretary determines otherwise, not less than ten percent of the amounts authorized under the statute shall be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals (the DBE program). On February 2, 1999, DOT issued regulations regarding implementation of the DBE program that are substantially different from those the district court reviewed in 1997. 64 Fed. Reg. 5129 (1999), now found at 49 C.F.R. Pt. 26. Many changes address the reasons the district court gave for holding both programs unconstitutional. See pp. 8-15, infra.

Because Adarand is seeking only prospective relief -- an injunction against the DBE program in future contracting -- the district court should first consider the regulatory changes to the two federal programs. The record now before this Court on appeal deals with the old regulations. But the new regulations, not the old ones, determine how the DBE program will be implemented in the future. Adarand's request for injunctive relief draws into question the new regulations and there is no record as of yet about how the DBE program will operate under those new regulations.

2. Indeed, the district court should, in the first instance, consider whether the permanent injunction it issued in the case remains equitable. In Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367, 384 (1991), the Supreme Court held that Federal Rule of Civil Procedure 60(b)(5) authorizes relief from an injunction if the movant shows "a significant change either in factual conditions or in law." In this case, the district court issued an "injunction

enjoining the Defendants from administering, enforcing, soliciting bids for, or allocating any funds under the SCC program." Adarand v. Peña, 965 F. Supp. 1556, 1558 (D. Colo. 1997). The district court also enjoined administration of the DBE provisions of ISTEA in Colorado. Ibid.

In light of DOT's declaration that SCCs will no longer be used in contracting, the district court should consider whether there is any need for an injunction against the SCC. In addition, the district court should examine its injunction in light of the substantial changes made to the DBE program. TEA-21 has replaced ISTEA, and the regulations implementing the DBE program have also been substantially modified, specifically addressing the concerns that led the district court to invalidate DOT's proper rules. If the district court agrees, then, under Rufo, it would be appropriate for the district court to relieve the federal government of the injunction. This Court should remand the case to the district court to consider whether the injunction remains necessary in light of the changes to the program.

3. Remand is also appropriate to avoid duplicative litigation. While this appeal is pending, Adarand v. Owens, No. 97-K-1351, is being litigated in the district court. The DBE program is also being challenged in Owens on the same constitutional bases raised in this case. DOT is a defendant in both cases.

4. Furthermore, determining the actual requirements the new regulations impose will likely require resolution of factual disputes. For instance, the State of Colorado has indicated that

it plans to implement a DBE program that is somewhat different from that specified by the new regulations. It has, in accordance with the new regulations, 49 C.F.R. 26.15, filed for a waiver from certain requirements. DOT is reviewing this waiver request and Colorado's program has not yet been approved. At this point, there is no record to establish how Colorado's DBE program will be implemented. Therefore, the parties should develop, in district court, a record about facts pertinent to the DBE program and how it may be implemented in Colorado before this Court adjudicates the merits of the DBE program.

B. Remand Is Necessary So That The District Court May Consider The Legislative History Of TEA-21 And The Changes To The Regulatory Scheme

1. The Legislative History Of TEA-21 And The New Regulations Support The Constitutionality Of The DBE Program

(a) Compelling Governmental Interest. The district court found that Congress has a compelling interest in addressing problems of discrimination in contracting. Adarand, 965 F. Supp. at 1576. The legislative history of TEA-21 supports this conclusion.

Congress carefully considered whether to continue DOT's DBE program in TEA-21 and engaged in an extensive debate about the program and its statutory provisions.[2/] The Senate defeated an

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2/ Congressional debates on the amendments to eliminate the DBE program from the highway bill are contained in the Congressional Record for March 5 and 6, 1998, for the Senate debate; April 1, 1998, for the House debate; and May 22, 1998, for the debate on the conference report in both chambers. References to the Senate debate are referenced as "S(page number of statement)" and to the House debate as "H(page number of statement)."

amendment that would have eliminated the DBE program by a vote of 58-37 (S1496). The House of Representatives rejected an amendment that would have eliminated the presumption of social and economic disadvantage for certain minority groups and women by a vote of 225 to 194 (H2011).

Congress found, after considering substantial evidence and thorough debate, that real, pervasive, and injurious racial and sexual discrimination continues to exist, that the effects of that discrimination hinder the ability of minority- and women-owned firms to participate equally in federal contracting. Members of the House of Representatives testified about the continuing nature of the problem, including: Rep. Norton (H2003); Rep. Poshard (H2003); Rep. Menendez (H2004); Rep. Jackson-Lee (H2006). Several Senators also recognized that such discrimination still persists, including: Senators Baucus (S1403, S1413, S1496); Warner (S1401); Kerry (S1408); Wellstone (S1410); Chafee (S5414); and Domenici (S1425).

Congress also found that goal-based programs like those in the DBE program were the only effective means to combat the continuing effects of discrimination. For example, Senator Baucus referred to the situation in Michigan where DBE participation in the state-funded portion of the highway program fell to zero in a nine-month period after the State terminated its DBE program, despite significant DBE participation in the Federal program in the same area (S1404). Senator Kennedy referred to similar patterns in Nebraska and Missouri (S1482), Senator Moseley-Braun cited such patterns in Arizona, Arkansas, and Delaware (S1420), and Senator

Kerry testified about similar results in Michigan, Louisiana, San Jose (California), and Hillsborough County (Florida) (S1409-10).

(b) Narrow Tailoring. In United States v. Paradise, 480 U.S. 149, 187 (1987), the Supreme Court articulated five factors that were relevant to the narrow tailoring inquiry: tailoring goals to the relevant market of minorities; the efficacy of race-neutral measures; the duration of the relief; availability of waivers; and the burden on non-minorities. Adarand, 965 F. Supp. at 1583. The district court struck down the SCC and DBE program as not narrowly tailored because of its view that the presumptions of disadvantage were necessarily over- and under-inclusive and therefore were unconstitutional. In our initial brief (Br. 21-27), we argue that the district court's disagreement with the use of any presumptions is wrong on several fronts. Most notably, it flatly contradicts the Supreme Court's holding that race-conscious relief is appropriate if narrowly tailored; the Court admonished lower courts not to view strict scrutiny as "strict in theory, but fatal in fact." Adarand v. Peña, 515 U.S. 200, 236 (1995) (citations omitted).

DOT's new regulations address the concerns the district court had about the program ((i), infra) and each of the factors the Paradise Court said were relevant to narrow tailoring ((ii) through (v), infra). Since the changes to the regulations significantly alter the regulatory scheme which is on appeal, remand is

appropriate to allow the district court to first consider the new program.[3/]

(i) Unlike The Program The District Court Reviewed, The New Program Has Enhanced Safeguards To Ensure Benefits Flow Only To Those Truly Disadvantaged. For the first time, the DBE program contains economic eligibility limitations. Owners of a firm applying for certification as a DBE, including minorities presumed to be disadvantaged, must submit a signed, notarized statement of personal net worth, with appropriate supporting documentation. 49 C.F.R. 26.67. If the individual owner's personal net worth exceeds $750,000, the presumption of economic disadvantage for the minority owner is conclusively rebutted and the individual and firm are not eligible to participate in the DBE program. Ibid. When a firm's receipts exceed the small business standards, it can no longer participate in the program, regardless of its owner's personal net worth. 49 C.F.R. 26.65. This change directly addresses the district court's determination that the presumptions are not sufficiently tailored to include only those that have been disadvantaged. Because this change was never considered below, the

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3/ Many members of Congress, prior to the enactment of TEA-21, found the new regulations were significant to their determination that the reenactment of the DBE requirement was appropriate. See generally, p. 8, supra. For instance, Senators Kerry, Baucus, Domenici, Spector, Chafee and Kennedy found that the DBE mandate, if implemented according to DOT's then proposed regulations, would pass both prongs of strict scrutiny because, now, States must first use race-neutral measures and DBE benefits flow only to those who are actually socially and economically disadvantaged (S1409, S1423-1425, S1430-1431, S1485-1486, S5413-5414).

district court should first address how the economic limitations affect the constitutionality of the program.

The new DBE program also retains provisions that permit any business owner, including a white male, to demonstrate social and economic disadvantage on an individual basis. Ibid. The new rule emphasizes that the DBE program is a disadvantaged-based program, and is not limited to members of minority groups. Preamble to 49 C.F.R. 26.67. The burden of proof non-minorities have to meet has also changed. In the old regulations, they had to show clear and convincing evidence that they were socially and economically disadvantaged; now, they need only demonstrate that disadvantage by a preponderance of evidence. Ibid. [4/]

(ii) Annual Goals Are Tailored To Relevant Market Of Minorities. Under the new regulations, 49 C.F.R. 26.45, recipients are required to set goals based on local market conditions. They are not required to meet the national ten percent annual goal or to employ special measures if their goals are below ten percent. 49 C.F.R. 26.41(c). Moreover, recipients must choose their own method for goal setting and should base their goal on the evidence that they believe best reflects their market conditions, based on a two-step process. 49 C.F.R. 26.45. The first step of the annual goal selection process requires creating a baseline figure for the relative availability of ready, willing and able DBEs in each recipient's market. 49 C.F.R. 26.45(c). The second step

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4/ Indeed, Adarand, whose owner is a white male, was certified as a DBE in June 1998. Since then, it has declined to seek recertification.

of the process permits recipients to adjust the base figure to ensure that the overall annual goal truly reflects the DBE participation the recipients expect absent the effects of discrimination. 49 C.F.R. 26.45(d).

If a recipient determines that contract goals are necessary to meet its overall goal, it nonetheless has substantial discretion in deciding when and how to use contract goals. Recipients are not required to set goals for each contract. If a recipient uses a contract goal, it may set the goal at a level appropriate for the type and location of the specific work involved. 49 C.F.R. 26.51. The district court did not review these procedures in 1997.

(iii) The DBE Program Now Requires Recipients To First Rely On Race-Neutral Remedies. The district court found that the federal government adequately considered race-neutral measures. Adarand, 965 F. Supp. at 1583. The new regulatory program is even better tailored in this aspect because, under the new regulations, recipients must first rely on race-neutral methods to meet their annual DBE goal. No comparable provision existed in the prior regulations. Recipients may resort to race-conscious methods only if necessary to achieve the annual DBE goal. See, e.g., 49 C.F.R. 26.51(a). Recommended race-neutral means include outreach to DBEs, assistance to DBEs in overcoming limitations such as the inability to obtain bonding or financing, and arranging solicitations in ways that facilitate participation by all small businesses, not just DBEs. 49 C.F.R. 26.51(b). Recipients must also consider that race-neutral DBE participation occurs when a DBE

wins a prime contract through the customary competitive bid process, or is awarded a subcontract absence reliance on DBE goals.

(iv) The DBE Program Is Subject To Periodic Review. The legislative history of TEA-21 shows that Congress reassessed the DBE program to ensure it remains necessary. Congress reauthorized the DBE program for six more years only after reviewing substantial evidence showing the continued need for the program.

Also, TEA-21 requires interim review of the impact of the DBE program. Within three years of the statute's enactment, "the Comptroller General of the United States shall conduct a review of, and publish and report to Congress findings and conclusions on, the impact throughout the United States of administering the" DBE provisions. 112 Stat. 114, § 1101(b)(6). Periodic reauthorization ensures the DBE program will not operate in perpetuity.

(v) The New DBE Program Provides For Waivers. The new regulations permit a recipient to seek waivers (as Colorado has) if it chooses to operate its DBE program differently from the way recommended in the DOT regulations. Waiver requests can pertain to such subjects as the use of a race-conscious measure other than a contract goal or different ways of counting DBE participation in certain industries. See Preamble to 49 C.F.R. 26.15. Also, recipients may receive exemptions if, because of unique circumstances not considered by DOT, compliance with specific provisions is impractical. 49 C.F.R. 26.15.

Even when a contract goal is established, it may be waived entirely if a prime contractor has made good faith efforts to

achieve the DBE contract goal. 49 C.F.R. 26.53. Recipients must give serious consideration to bidders' documentation of their good faith efforts and are strictly prohibited from interpreting the goals as quotas. 49 C.F.R. 26.43, 26.53. The new regulations allow bidders to seek administrative reconsideration when their good faith efforts are initially rejected. 49 C.F.R. 26.53(d).

(vi) The New DBE Program Does Not Unduly Burden Non-Minorities. The new DBE program affects only minimally the legitimate interests of non-DBE firms because, under 49 C.F.R. 26.51, recipients need not set a goal for each contract; they must first direct their efforts to race-neutral efforts, and any goal must be based on the availability of DBEs. Even if recipients use a contract goal, they may not deny a contract to a bidder simply because the bidder did not meet the goal. 49 C.F.R. 26.53. Also, for the first time, the DBE program requires recipients to determine if DBE firms are overconcentrated in a certain type of work. If so, recipients must address the problem so that non-DBEs are not unfairly prevented from competing for subcontracts. 49 C.F.R. 26.33. Thus, goals do not unfairly depress the market available to non-DBEs.

2. Elimination Of The SCC Program

DOT has rescinded the SCC and will no longer use it in contracts awarded throughout the United States by the Federal Lands Highway Division of the Federal Highway Administration, the only division in DOT to use the SCC. Moreover, the SCC has not been used in Colorado since 1997 when the district court enjoined its use.

Thus, the first question for the court is whether the SCC claim is moot. This should be assessed by the district court.

If the district court determines that the SCC aspect of this litigation is not moot (see pp. 1-2, supra), it should address the changes to the SCC program. The new regulations better narrowly tailor the SCC program because only those who meet personal net worth and business size limits can qualify as DBEs. See p. 12, supra. Additionally, in November 1997, DOT changed its SCC language to more clearly inform prime contractors they will be compensated only if they incur and document additional costs in trying to subcontract with DBEs (addendum).

CONCLUSION

The federal government has eliminated the SCC and has significantly altered the DBE program. Since the plaintiff has requested only prospective relief, the district court must now consider the new DBE program. The district court is best equipped to address these new factual issues. This Court should therefore remand the case to the district court with directions to consider: (1) whether the claim against the SCC program is moot; (2) the constitutionality of the DBE program in light of the changes to that program; and (3) whether its injunction against the old programs remains appropriate.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the 15-page limit of this Court's February 24, 2000, order for supplemental briefing. This brief has been prepared in monospaced typeface using Wordperfect 7.0, with Courier typeface with 10 characters per inch.

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